Supreme Court, U.S.
FILED

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No. 04-

IN THE
Supreme Court of the United States

BRYAN ASHLEY BOWEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN M. ORR
ORR & OLAVSON
804 Rio Grande
Austin, Texas 78701
(512) 472-8392

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

I. Whether the United States waives the right to raise a defendant's collateral attack waiver clause contained in a plea bargain agreement if the United States fails to preserve the issue at the District Court level?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b), the parties to the proceeding below were Petitioner Bryan Ashley Bowen and the United States of America. The United States is the Respondent before this Court.

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OPINIONS BELOW

The unpublished opinion of the Court of Appeals for the Fifth Circuit styled *United States v. Bryan Ashley Bowen,* No. 03-51166, issued on February 2, 2005, is attached hereto in the Appendix.

The unpublished opinion of the United States District Court for the Western District of Texas, the Honorable Sam Sparks presiding, issued on September 30th, 2003 in cause number A-03-CV-489, is also included in the Appendix.

JURISDICTION

The United States District Court was granted exclusive original jurisdiction over this case by 18 U.S.C. § 3231.

Appeal was made from the final judgment of the District Court to the Fifth Circuit Court of Appeals under 28 U.S.C. § 1291.

The Court of Appeals affirmed in an order entered February 2, 2005. There was no petition for rehearing. This petition follows within 90 days of the judgment of the Court of Appeals.

The jurisdiction of this Court to grant certiorari is invoked pursuant to 28 U.S.C. § 1254(1).

The United States is a party to be served, and the undersigned states that service has been made on the Solicitor General of the United States, Room 5614, Dept. of Justice, 950 Pennsylvania Ave NW, Washington DC 20530-0001, pursuant to Supreme Court Rules 14.1(e)(v) and 29.4(a).

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Due Process clause of the Fifth Amendment, which provides in relevant part that "no person shall be deprived of life, liberty, or property without due process of law." U.S. CONST., amend. V.

STATEMENT OF THE CASE

Petitioner Bowen pleaded guilty pursuant a plea agreement in federal district court. The plea agreement stated that Bowen waived his right to appeal and to file a motion pursuant to 28 U.S.C. § 2255. The district judge told Bowen that he would have a right to appeal or to file a § 2255 motion if there was ineffective assistance of counsel.

Bowen timely brought a motion to vacate sentence pursuant to 28 U.S.C. § 2255, alleging ineffective assistance. The ineffectiveness caused Bowen to be incorrectly classified as a career criminal under the Sentencing Guidelines.

The district court held two hearings on the matter. The United States and Bowen briefed the matter extensively. The district court wrote a lengthy opinion and eventually denied Bowen's motion. The United States failed to assert that Bowen had waived his right to bring a § 2255 motion.

Bowen appealed to the Fifth Circuit Court of Appeals. The Court of Appeals issued a certificate of appealability and *sua sponte* directed the parties to brief the issue of whether Bowen was precluded from appealing because of the waiver. For the first time, the United States asserted that Bowen had waived his right to challenge his sentence via § 2255. Bowen responded that the United States had waived its waiver argument by failing to present it to the district court. Alternatively, Bowen asserted that since the district court had told Bowen he had the right to bring an ineffectiveness of counsel claim, Bowen should be permitted to do so.

The Fifth Circuit held that the waiver provision in Bowen's plea agreement was binding and enforceable, and dismissed the appeal for want of jurisdiction.

REASONS FOR GRANTING THE WRIT

I. The United States waived their right to raise a collateral attack waiver clause contained in a plea agreement because they neglected to raise or preserve the issue at the district court level.

It is now standard procedure in most federal plea agreements between criminal defendants and the United States for defendants to waive their right to appeal. This waiver usually encompasses their right to collaterally attack their sentences through 28 U.S.C. § 2255. Such waiver provisions are generally enforceable.

However, their enforcement is conditioned upon the fact that the United States must assert its right to enforce the waiver provision. The United States may expressly decline to assert the waiver provision, allowing the appeal or collateral attack may go forward. *United States v. Garcia-Lopez,* 309 F.3d 1121, 1123 (9th Cir. 2002); *United States v. Rhodes,* 253 F.3d 800, 804 (5th Cir. 2001); *United States v. Schmidt,* 47 F.3d 188, 190-92 (7th Cir. 1995). The Fifth Circuit in Bowen's case inexplicably decided that the waiver issue was "jurisdictional." Its opinion dismisses the appeal for "want of jurisdiction." Bowen asserts that the waiver of his rights is rooted in the contract between Bowen and the U.S. and is not jurisdictional. The action of the Fifth Circuit incorrectly dismissing on jurisdictional grounds violates the due process clause of the U.S. Constitution's Fifth Amendment. U.S. CONST., amend. V.

The issue in this case is whether the United States waives its rights if it fails to assert them. The jurisprudence of this Court indicates that it does. *See generally United States v. Mezzanatto,* 513 U.S. 196, 201, 115 S.Ct. 797, 801-02 (2002); *Shutte v. Thompson,* 82 U.S. 151, 15 Wall. 151, 159, 21 L. Ed. 123 (1873) ("A party may waive any provision, either of a contract or of a statute, intended for his

benefit"); *Peretz v. United States,* 501 U.S. 923, 936, 115 L. Ed. 2d 808, 111 S. Ct. 2661 (1991) ("The most basic rights of criminal defendants are. . . subject to waiver"). A criminal defendant, for example, may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution. *See, e. g., Ricketts* v. *Adamson,* 483 U.S. 1, 10, 97 L. Ed. 2d 1, 107 S. Ct. 2680 (1987) (double jeopardy defense waivable by pretrial agreement); *Boykin* v. *Alabama,* 395 U.S. 238, 243, 23 L. Ed. 2d 274, 89 S. Ct. 1709 (1969) (knowing and voluntary guilty plea waives privilege against compulsory self-incrimination, right to jury trial, and right to confront one's accusers). Likewise, absent some affirmative indication of Congress' intent to preclude waiver, this Court has presumed that statutory provisions are subject to waiver by voluntary agreement of the parties. *See, e. g., Evans* v. *Jeff D.,* 475 U.S. 717, 730-732, 89 L. Ed. 2d 747, 106 S. Ct. 1531 (1986) (prevailing party in civil-rights action may waive its statutory eligibility for attorney's fees).

The presumption of waivability has found specific application in the context of evidentiary rules. Absent some "overriding procedural consideration that prevents enforcement of the contract," courts have held that agreements to waive evidentiary rules are generally enforceable even over a party's subsequent objections. *Mezzanatto,* 513 U.S. at 201, 115 S.Ct. at 802, citing 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5039, pp. 207-208 (1977). Courts have "liberally enforced" agreements to waive various exclusionary rules of evidence. *Note, Contracts to Alter the Rules of Evidence,* 46 Harv. L. Rev. 138, 139-140 (1933). At the time of the adoption of the Federal Rules of Evidence, agreements as to the admissibility of documentary evidence were routinely enforced and held to preclude subsequent objections as to authenticity. *Mezzanatto, Id.*

The United States admitted in its brief to the Fifth Circuit that it failed to raise the waiver provision in the district court to the § 2255 motion. Bowen has preserved error on this ground by timely taking the position in its briefing to the Fifth Circuit that the United States has waived its rights to enforce the plea agreement.

In this case the parties extensively litigated the merits of Bowen's claim in front of the district court. The district court carefully considered the merits of the claim and issued its opinion. The opinion is attached in the appendix hereto; it is ten pages long. Bowen disagreed with the opinion and appealed. Bowen filed his brief on certificate of appealability, which the Fifth Circuit granted. Bowen then filed his brief on the merits. Only in the reply to Bowen's brief on the merits, filed on September 1, 2004, well after a year since Bowen filed his § 2255 motion, does the United States assert that Bowen is barred from seeking § 2255 relief. This is a staggering waste of judicial resources. After all the parties - and the district judge - debated the merits of Bowen's claim, the claim is disposed of by a procedural technicality that the United States had failed to assert. The common law doctrine of waiver is intended to prevent this very waste of resources and unfairness.

CONCLUSION

For the foregoing reasons, I respectfully urge that the writ of certiorari be granted, and that the cause be remanded to the court of appeals to consider the merits of Bowen's appeal.

Respectfully submitted,

STEPHEN M. ORR
ORR & OLAVSON
804 Rio Grande
Austin, Texas 78701
(512) 472-8392

Counsel for Petitioner

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-51166
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRYAN ASHLEY BOWEN, also known as "BB,"

Defendant-Appellant.

United States Court of Appeals
Fifth Circuit
FILED
February 2, 2005
Charles F. Fulbruge III, Clerk

Appeal from the United States District Court
for the Western District of Texas
USDC Nos. A-03-CV-489-SS
A-02-CR-74-ALL-SS

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

PER CURIAM:*

Bryan Ashely Bowen, federal prisoner #28585-180, appeals the district court's denial of his 28 U.S.C. § 2255 motion challenging his guilty-plea conviction for conspiracy to possess with intent to distribute cocaine, methamphetamine, and MDMA, and possession of a semi-automatic weapon in furtherance of a drug-trafficking crime. Bowen contends that his attorney provided ineffective assistance by failing to object to the enhancement of his sentence for being a career offender.

We previously ordered Bowen's attorney to supplement the record with the rearraignment transcript and ordered both parties to provide supplemental briefing addressing the validity and applicability of the waiver provision in Bowen's plea agreement. On appeal, Bowen does not contest the validity of the waiver provision, but rather asserts that it should be construed to except challenges on the basis of ineffective assistance due to the district court's admonishment at rearraignment.

Bowen did not object to any FED. R. CRIM. P. 11 error before the district court. Given the explicit terms of the waiver provision in the plea agreement, the Government's iteration of those terms at rearraignment, the thorough nature of the district court's admonishment that the waiver would bar Bowen from later revisiting his sentence, and Bowen's failure to assert that he was misled by any misstatement by the district court regarding the exceptions to the waiver, he has not established plain error. *See United States v. Vonn,* 535 U.S. 55, 59 (2002); *United States v. Calverley,* 37 F.3d 160, 162-164 (5th Cir. 1994) (en banc). Therefore, the appeal waiver provision is

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

binding, and we DISMISS the appeal for lack of jurisdiction. *See United States v. Martinez,* 263 F.3d 436, 438 (5th Cir. 2001).

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 03-51166
Summary Calendar

D.C. Docket No. A-02-CR-74-ALL-SS
A-03-CV-489-SS

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

BRYAN ASHLEY BOWEN, also known as "BB,"

Defendant-Appellant

United States Court of Appeals
Fifth Circuit
FILED
February 2, 2005
Charles F. Fulbruge III, Clerk

FILED
APR –1, 2005
Clerk, U.S. District Court
Western District of Texas
By: /s/ MCW Deputy Clerk

Appeal from the United States District Court
for the Western District of Texas, Austin.

Before WIENER, BENAVIDES, and STEWART, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal in this cause is dismissed for lack of jurisdiction.

ISSUED AS MANDATE: MAR 29 2005

Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/ [signature illegible]
Deputy
New Orleans, Louisiana MAR 29 2005

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-03-CA-489SS
[No. A-02-CR-074-SS]

BRYAN BOWEN,

Movant,

–vs.–

UNITED STATES OF AMERICA,

Respondent.

FILED
AUSTIN DIVISION
2003 SP 30 PM 4:13
WESTERN DISTRICT OF TEXAS
U.S. CLERK'S OFFICE
BY: /s/ [initials] DEPUTY

ORDER

BE IT REMEMBERED on the 30th day of September 2003 the Court reviewed the file in the above-styled cause, specifically Movant Bryan Ashley Bowen's Motion to Correct Sentence pursuant to 28 U.S.C. § 2255 [#47], the Government's response thereto [#49] and Bowen's reply [#50]. On August 20, 2003, the Court held a hearing on the section 2255 motion, and the parties appeared through counsel of record. The Court recessed the hearing until September 23,

2003, where the parties again appeared through counsel of record and presented evidence. Having considered the motion, response and reply, the arguments and evidence presented at the hearings, the case file as a whole and the applicable law, the Court enters the following opinion and order.

Factual and Procedural Background

On March 19, 2002, Bowen was indicted for conspiracy to possess with intent do distribute methamphetamine, cocaine and/or ecstasy (Count One); possession with intent to distribute fifty grams or more of methamphetamine (Count Two); possession with intent to distribute cocaine (Count Three); felon in possession of a firearm (Count Four); use of a firearm during and in relation to a drug trafficking crime (Count Five); use of an explosive or incendiary device during and in relation to a drug trafficking crime (Count Six); possession of a semiautomatic assault weapon in furtherance of a drug trafficking crime (Counts Seven and Eight); and possession of a firearm in furtherance of a drug trafficking crime (Count Nine). On May 20, 2002, Bowen pleaded guilty to Counts One and Seven pursuant to a plea agreement between Bowen and the United States Attorney.[1]

On July 19, 2002, with a judgment signed July 29, 2002, the Court sentenced Bowen to 188 months imprisonment on Count One and 120 months imprisonment on Count Seven, to be served consecutively, followed by a five-year term of supervised release. The Court sentenced Bowen based on a base offense level of 31 and a criminal history category of VI,

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[1] In the plea agreement, Bowen waived his right to appeal his sentence or challenge it in any post-conviction proceeding, including a motion under 28 U.S.C. § 2255 unless the Court upward departed in sentencing him. He was advised and admitted under oath that he understood he could receive a maximum sentence of fifty years (forty years for Count One plus ten years for Count Seven, to run concurrently).

which led to a guideline range of 188 to 235 months imprisonment on Count One. On Count Seven, the Court sentenced Bowen according to a statutory sentence of 120 months, which must be served consecutively to the sentence on Count One. Bowen was sentenced as a career offender under section 4B1.1 of the Sentencing Guidelines because he had at least two prior felony convictions of either a crime of violence of controlled substance: (1) possession with intent to deliver a controlled substance (Cause No. 94-1828) and (2) aggravated assault with serious bodily injury (Cause No. 95-5655).

On July 29, 2002, Bowen filed a motion for new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure. He requested reconsideration of his sentence to Count One. Specifically, he argues he should not have been sentenced as a career offender because he was convicted of possession of a controlled substance, not possession with intent to deliver, in Cause No. 94-1828. A conviction of possession of a controlled substance, without intent to delivery, cannot be used to render a defendant a career offender. *See* U.S.S.G. § 4B1.2(b). On April 11, 1994, Bowen was indicted in the 331" Judicial District of Travis County, Texas for "intentionally possess[ing] with intent to deliver a controlled substance, namely: cocaine." *State of Texas v. Bryan A. Bowen,* No. 94-1828 (indictment).[2] On August 17, 1994, Bowen entered a plea agreement for deferred adjudication and the judge specifically found the evidence was sufficient to find Bowen guilty of possession with intent to deliver a controlled substance – cocaine, a first degree felony. *Id.* (order deferring further proceedings). On September 15, 1994, the court signed an order deferring further proceedings and placing Bowen on community supervision for ten years. *Id.* Subsequently, Bowen

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[2] The Court attached the state court documents to its August 16, 2002 Order.

violated the terms of his community supervision, and on June 25, 1998, the court signed a judgment finding Bowen guilty of "possession [sic] of a controlled substance, namely cocaine, first degree felony," and sentenced him to four years imprisonment in the Texas Department of Criminal Justice, Institutional Division. *Id.* (judgment). Bowen argued the judgment in that case mistakenly identified the crime as a first-degree felony, when he was actually convicted of possession, a second-degree felony. The Court rejected that argument, finding the deferred adjudication order was the final judgment in the case and, since the crime identified in that order as well as the indictment was possession with intent to deliver cocaine, a first-degree felony, Bowen was correctly sentenced as a career offender. The Court denied the motion for a new trial on August 16, 2002.

Bowen's original retained lawyer and his lawyers retained after sentencing who filed the motion for new trial both filed notices of appeal on July 29, 2002. On September 13, 2002, the Fifth Circuit dismissed his appeal for want of prosecution; specifically, the appellant failed to timely order the transcript and pay docketing fees. Bowen filed the instant section 2255 motion on July 17, 2003. He contends he received ineffective assistance of counsel at sentencing because his retained counsel did not adequately research his prior state court conviction in Cause No. 94-1828 to discover he was convicted of possession, not delivery, and, as a result, Bowen was sentenced as a career offender. After the Government filed its response to the motion, Bowen filed a surreply and attached a Judgment Nunc Pro Tunc signed by District Judge Mike Lynch and filed with the District Court on August 12, 2003. *See* Reply, Ex. A ("Nunc Pro Tunc"). The Judgment Nunc Pro Tunc recites Bowen was convicted of the lesser included offense of possession of a controlled substance (cocaine), a second-degree felony, on June 19, 1998. The Court held a hearing in the above-styled cause on

August 20, 2003 and, after recessing the case to give the movant an opportunity to gather evidence, held an evidentiary hearing on September 23, 2003.

Analysis

Under Section 2255, there are generally four grounds upon which a defendant may move to vacate, set aside or correct his sentence: (1) the sentence was imposed in violation of the Constitution of laws or the United States; (2) the district court was without jurisdiction to impose the sentence; (3) the sentence imposed was in excess of the maximum authorized by law; and (4) the sentence is otherwise subject to collateral attack. 28 U.S.C. § 2255. The nature of a collateral challenge under Section 2255 is extremely limited: "A defendant can challenge his conviction after it is presumed final only on issues of constitutional or jurisdictional magnitude...and may not raise an issue for the first time on collateral review without showing both 'cause' for his procedural default, and 'actual prejudice' resulting from the error." *United States v. Shaid,* 937 F.2d 228, 232 (5th Cir.1991), *cert denied,* 112 S. Ct. 978 (1992). If the error is not of constitutional or jurisdictional magnitude, the movant must show that the error could have been raised on direct appeal and would, if condoned, "result in a complete miscarriage of justice." *See United States v. Smith,* 32 F.3d 194, 196 (5th Cir. 1994). In addition, if a defendant has exhausted or waived his right to appeal, as Bowen has, he must show both cause and actual prejudice when "rais[ing] a constitutional or jurisdictional issue for the first time on collateral review." *See United States v. Placene,* 81 F.3d 555, 558 (5th Cir. 1996).

Bowen contends he received ineffective assistance of counsel at sentencing, in violation of the Sixth Amendment to the United States Constitution. To establish ineffective assistance of counsel, Bowen must allege and prove his

counsel's performance was deficient and the deficient performance prejudiced his defense. *See Strickland v. Washington,* 104 S. Ct. 2052 (1984). To establish deficient performance, Bowen must show his "attorney's errors were so serious that his counsel was not functioning as the 'counsel' the Sixth Amendment guarantees." *Jernigan v. Collins,* 980 F.2d 292, 296 (5th Cir. 1992), *cert. denied,* 113 S. Ct. 2977 (1993) (internal quotations omitted). The Court reviews the attorney's conduct with great deference, and there is a strong presumption that counsel has exercised reasonable professional judgment. *Lockhart v. McCotter,* 782 F.2d 1275, 1279 (5th Cir. 1986), *cert. denied,* 107 S. Ct. 873 (1987). To establish the second prong, prejudice, Bowen must establish a reasonable probability that, but for counsel's deficiency, the result of the proceeding would have been different. *See Glover v. United States,* 121 S. Ct. 696, 700 (2001).

In this case, to establish his attorney's performance was deficient, Bowen must first show he was, in fact, convicted of possession instead of delivery in state court. He must then show his attorney's failure to discover and correct the error was unreasonable. The Court finds Bowen has surpassed neither barrier. First, the judgment nunc por tunc does not affect the deferred adjudication order, which is a final judgment for purposes of career offender calculations. *See United States v. Joshua,* 305 F.3d 352 (5th Cir. 2002) (holding a deferred adjudication is a conviction for purposes of U.S.S.G. 4B1.1); *United States v. Vasquez,* 298 F.3d 354, 358 (5th Cir. 2002) (holding a deferred adjudication is "final" and therefore can be used to enhance a defendant's sentence under 21 U.S.C. § 841(b)(1)(B)). The new nunc pro tunc judgment of August 21, 2003 states Bowen was found guilty of the lesser included offense of possession of a controlled substance – cocaine, a second-degree felony, on June 19, 1998 upon a motion of the state to proceed with an adjudication of guilt because he

violated the terms of his deferred adjudication. However, the deferred adjudication order signed by Judge Mike Lynch and filed on September 16, 1994 finds Bowen guilty of possession with intent to deliver a controlled substance, a first-degree felony, and places him on community supervision for ten years. This deferred adjudication order was a final judgment. Additionally, the indictment demonstrates Bowen was indicted for the offense of possession with intent to deliver cocaine.

The transcript from the revocation hearing indicates Judge Lynch may have negotiated a lower prison sentence with Bowen's counsel after he violated the terms of deferred adjudication, recommending the five-year minimum sentence for possession with intent to deliver be reduced to four years.[3] See Motion to Correct Sentence, Ex. B ("Tr.") at 18-20. However, any negotiation took place years after the deferred adjudication order was entered and did not affect that order, which is a final judgment.[4] Additionally, at the revocation

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[3] During this Court's evidentiary hearing on September 23, 2003, Bowen's counsel, Robert Buford, testified that Bowen's revocation was "settled" with Judge Lynch in an ex parte hearing. Specifically, Mr. Buford testified that it is the "...custom now, that you can approach the judge, even though it's technically not proper, without the opposing counsel being there, and they don't really care. That's just the way it's done." The Court finds this evidence troubling because ex parte communications by a judge to a party or his lawyer create an overwhelming appearance of impropriety.

[4] Moreover, as the Assistant United States Attorney points out, it would be absurd for a judge to reward a defendant for violating the terms of his deferred adjudication and committing further crimes by reducing the magnitude of the crime for which he was indicted and to which he pleaded guilty. In other words, it cannot be the case that had Bowen successfully followed the terms of his deferred adjudication, his conviction would stand as possession with intent to deliver, but since he violated the terms, his conviction was reduced to simple possession. Any less than minimum sentence Judge Lynch recommended must have been not a reward or a reduction of the degree of the crime but a consideration of the four years

hearing, the magistrate judge again confirmed that "on August 17 of 1994 [Bowen] pled guilty before Judge Lynch to the offense of delivery of cocaine, a first-degree felony," to which Bowen responded, "true." Tr. at 5. Later in the hearing, the judge asked Bowen if he understood that Cause No. 94-1828 was "a deferred adjudication probation on a first-degree felony and you have got a minimum of five years in the Institutional Division or to the maximum of 99 years to life in the Institutional Division," and Bowen replied that he understood. Only later in the hearing did the judge note Judge Lynch had recommended a sentence below the minimum, and he never stated Bowen was actually pleading guilty to the lesser included offense of possession, a second-degree felony. Therefore, the record nowhere indicates Bowen actually pleaded guilty to and received deferred adjudication of possession instead of possession with intent to deliver.

This Court's holding that Bowen's adjudication order is a final judgment is consistent with the Court's August 16, 2002 order denying Bowen's motion for new trial, where the Court held the deferred adjudication order was a final judgment and would not be affected by any subsequent nunc pro tunc judgment. Bowen had the opportunity to appeal this ruling and the Court's decision to sentence him as a career offender and, although he timely filed a notice of appeal and was represented on appeal by the same competent counsel who represent him today, his appeal was dismissed for want of prosecution. The Court sees no reason to reverse its own ruling when Bowen waived his opportunity to appeal it.

Further, Bowen has not demonstrated his counsel, Russell Ramirez, was unreasonable for failing to investigate whether he

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Bowen had already spent on deferred adjudication or simply the result of ex parte negotiations in a jurisdiction with an over crowded criminal docket and jail.

was in fact convicted in Cause No. 94-1828 for possession with intent to deliver instead of just possession, a first degree felony, as the indictment and deferred adjudication order expressly stated. Bowen argues his counsel should have recognized the inconsistency between the above documents, which state he was charged with, pleaded guilty to and was convicted of possession with intent to deliver cocaine (which carries a five-year minimum sentence), and the four-year sentence he received after his deferred adjudication was revoked. As the Court discussed above, the court documents indicate Bowen was convicted of possession with intent to deliver, and he received a lower than minimum sentence only because the district judge agreed to recommended a lower sentence when his deferred adjudication was revoked. Additionally, it is not unreasonable for an attorney to presume official court documents are accurate. Further, the record indicates counsel made fifteen objections to the presentence investigation report. Therefore, the Court finds counsel's performance was not objectively unreasonable and Bowen has not shown he received ineffective assistance of counsel.

In accordance with the foregoing:

IT IS ORDERED that Movant Bryan Ashley Bowen's Motion to Correct Sentence pursuant to 28 U.S.C. § 2255 [#47] is DENIED.

Signed this the 30th day of September 2003.

/s/ Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

Case No. A-03-CA-489SS
No. A-02-CR-074-SS]

BRYAN BOWEN,

Movant,

–vs–

UNITED STATES OF AMERICA,

Respondent.

FILED
AUSTIN DIVISION
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WESTERN DISTRICT OF TEXAS
U.S. CLERK'S OFFICE
BY: /s/ [initials] DEPUTY

JUDGMENT

BE IT REMEMBERED on the 30th day of September 2003 the Court entered its order denying petitioner Bryan Ashley Bowen's Motion to Vacate, Set Aside, or Correct Sentence pursuant to 28 U.S.C. § 2255 against respondent United States of America. The Court accordingly enters the following judgment.

IT IS ORDERED, ADJUDGED, and DECREED that petitioner Bryan Ashley Bowen's Motion to Vacate, Set Aside,

or Correct Sentence is DENIED and this cause DISMISSED, and that the respondent United States of America go hence without delay and with its costs, for which let execution issue against the petitioner.

SIGNED this the 30th day of September 2003.

/s/ Sam Sparks

SAM SPARKS
UNITED STATES DISTRICT JUDGE